

AUG 18 1978

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 78-274

LAWRENCE WILCHER,

Petitioner

v

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

Palmer K. Ward
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Indianapolis, IN 46220

Attorney for Petitioner.

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Lawrence Wilcher, by counsel, Palmer K. Ward, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in affirming the judgment of the United States District Court for the Western District of Kentucky at Louisville, upon his conviction of six offenses against the mail fraud statute and two counts of making false declarations before a Grand Jury, said convictions being affirmed by the United States Court of Appeals on June 19, 1978 and the petition for rehearing being denied

on July 20, 1978.

OPINION OF THE UNITED STATES
COURT OF APPEALS

The opinion of the United States Court of Appeals for the Sixth Circuit has not been officially reported but is reproduced herein in Appendix "A" to this petition.

The denial of the petition for rehearing is reproduced herein in Appendix "B" to this petition.

JURISDICTION

1. The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 19, 1978.

2. A timely Petition for Rehearing was filed and overruled by the Court on July 20, 1978.

3. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Did the trial Judge err when he ordered the attorney representing the

defendant and his wife in a civil case involving the collection of proceeds from various insurance companies as a result of a fire which destroyed their property to answer various questions propounded by the government after the defendant invoked the privilege of attorney and client?

2. Did the government bear the burden of proving the materiality of testimony given before the Grand Jury by the defendant, which testimony the government claimed to be false?

STATEMENT OF THE CASE

Petitioner was charged with six offenses against the mail fraud statute and two counts of making false declarations before a Grand Jury. He was found guilty by a jury and sentenced to serve a total of seven years imprisonment and pay a fine of \$11,000.00 Dollars. The judgment is reproduced herein in Appendix "C" to this petition. This indictment charged the defendant in Count 1 with devising a

scheme to defraud various insurance companies by buying merchandise to sell in his store and by requesting invoices that overstated the cost of the merchandise, further that he increased the insurance on his store and its contents to an amount of ove one million dollars; further that he arranged for the buring of said store or had knowledge of its burning and then filed various fraudulently claims against the insurance companies and infurtherance of said scheme he mailed a proof of loss to Bolton and Company. Count 3 alleged a mailing to an insurance agency that the various insurance policies had been cancelled. Count 4 alleged that a letter was mailed to the adjustor containing sworn proofs of loss. Count 5 alleged that the defendant's lawyer mailed a letter to the lawyer for the insurance companies alleging that the invoices were guide statements. Count 6 alleged that the lawyer for the insruance companies mailed a letter to the defendant's lawyer containing the policies of insurance.

Count 7 alleges that the attorney for the defendant mailed to the attorney for the insurance companies interrogatories in the civil suit pending.

Counts 7 and 8 allege the defendant with having lied to a Grand Jury by stating that he had never submitted to any insurance companies any statements that were not true or as represented on their face and further that he had never procured false invoices from the David Shoe Company.

Federal jurisdiction is present because the indictment alleged violations of Title 18, United States Code, Sections 2, 1341 and 1623.

Early in the trial of this cause the government called as one of their witnesses, Elmer George. Mr. George had represented the petitioner on various matters at Lebanon, Kentucky and was his attorney of record in a civil law suit that had been filed against various insurance companies that had insured the petitioner's

business property and its contents against loss by fire. During the course of his employment as attorney for the petitioner and his wife it was necessary for him to perform various services in connection with his attempts to secure payment under the terms of the various policies. These services consisted of, among other things, sending proofs of loss to the companies; the cancellation of the various policies and causing the return of unearned premiums; letters concerning the statements from the David Shoe Company; causing the attorney for the insurance company to mail copies of the various policies to him; and, after suit had been filed after the companies had denied the claim, to cause to be mailed to the attorney for the companies interrogatories in the case. At the appropriate time in the testimony of Mr. George, counsel for the petitioner attempted to invoke the attorney-client privilege in an effort to stop the testimony of Mr. George. The Court overruled

the objection. Mr. George was forced to testify that the Petitioner had called the witness the night of the fire; that he represented him in all matters connected with the fire; that he prepared various claims and proof of loss and caused the same to be transmitted to the proper persons; that he caused the cancellation of the insurance policies and arranged for a return of the unearned premiums. That he prepared and filed a lawsuit on behalf of petitioner and his wife in an attempt to collect for the losses brought about by the fire and also prepared and mailed to counsel opposed certain interrogatories in said civil suit. The Court even permitted the government to inquire into the fee arrangement between the witness and petitioner. In short, over objection, the witness supplied the evidence needed by the government to prove the counts of mail fraud alleged in the indictment.

Counts 8 and nine of the indictment charge that the defendant while testifying

before the Grand Jury testified falsely concerning whether he had submitted false claims against the insurance companies concerning the fire losses and whether he had ever procured from David Shoe Company false invoices. The only evidence in the record as to these two counts of the indictment is Government's Exhibit 54 which is a stipulation by the parties as to two isolated parts of testimony given by the defendant before the Grand Jury. There was no evidence introduced at the trial that they trial jury could conclude that the Grand Jury was trying to determine that petitioner and others had violated the federal law in connection with a scheme to defraud insurance companies. There is no evidence that the Grand Jury considered it material to know whether Wilcher had obtained invoices overstating the value of property purchased. There is a total lack of evidence as to what the Grand Jury was investigating; no attempt was made to prove the materiality of said questions.

ARGUMENT

We would submit that the client made timely objection to the damaging testimony of his lawyer but said objection was overruled by the trial Court and as a result the mail fraud counts of the indictment were proven by the lawyer who was representing the defendant in the civil matters involved with the insurance claims. In effect the defendant was denied his Fifth Amendment right against self-incrimination in that his lawyer was permitted to testify as to everything that transpired between the attorney and his client.

We believe that this matter has been passed upon by this Court in the case of Fisher v United States (1976) 96 S. Ct. 1569 where it was held:

" As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. "

By permitting the attorney, Elmer George, to testify as to communications between attorney and client the government was able to get into evidence matters that were properly protected and therefore the defendant was denied his right to be free from self-incrimination and he was forced to testify against himself at the trial of this cause.

Counts 8 and 9 of the indictment charge that the defendant, while testifying before the Gran Jury, that returned the indictment herein testified falsely as to whether he had ever submitted to insurance companies in connection with any fire losses documents which represented the sale of goods which documents were not true as represented on their face and whether he had ever procured from the David Shoe Company false invoices that overstated the amount that he paid for quantities of shoes purchased from said company.

The only evidence in the record as to these two counts is a stipulation by the parties as to two isolated parts of the testimony given by the defendant while appearing before the Grand Jury.

There is no evidence before the trial jury upon which they could conclude that the Grand Jury was trying to determine that the defendant and others had violated any federal statutes. There is no evidence that the Grand Jury considered it material to know whether Wilcher had obtained invoices overstating the value of shoes purchased. There is no evidence in the record as to what the Grand Jury was investigating. The government made no attempt to prove the materiality of said questions that were set out in the indictment as being false.

As was stated in the recent case of United States v Howard (1977) 560 Fed 2nd 281 (C. A. 7):

" It is undisputed that the Government bears the burden of proving the

materiality of testimony claimed to be false. The determination of materiality is evaluated at the time of the investigation. "

The government having introduced no evidence showing the materiality of the inquiry of the Grand Jury then the conviction cannot stand as there is no evidence before the trial Court to show the materiality of the answers alleged to be false.

CONCLUSION

For the reasons herein stated we respectfully pray the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review their final judgment.

Respectfully submitted,

Palmer K. Ward
5350 Allisonville Road
Indianapolis, IN 46220

Attorney for Petitioner.

NO. 77-5345

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

JUN 19 1978

UNITED STATES OF AMERICA : JOHN P. HEHMAN, Clerk
 Plaintiff-Appellee :
 v. : ORDER
 LAWRENCE WILCHER a/k/a LARRY WILCHER :
 Defendant-Appellant :

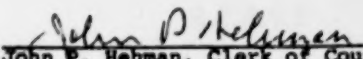
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Before: PHILLIPS, Chief Judge, and PECK and ENGEL,
 Circuit Judges.

Defendant-appellant perfected this appeal from his conviction pursuant to jury trial on six counts of mail fraud and on two counts of perjury, in violation of 18 U.S.C. §§ 1341, 2, and 1623, and the appeal has been submitted on the record on appeal and on the briefs of counsel. The indictment charged that appellant had devised and carried out a scheme to defraud insurance companies by procuring false invoices on the basis of which he maintained records reflecting merchandise inventories at a value in excess of cost, and using such inventories as the basis of recovery from the carrier following casualty losses. On appeal appellant particularly contends that certain evidence received was in violation of the attorney-client relationship and that the record contains insufficient proof to sustain the verdict of guilty of perjury. It having been concluded that these contentions are without merit and that the record discloses no error prejudicial to the rights of the appellant,

IT IS ORDERED that the judgment of the district court
be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT


John P. Hehman, Clerk of Court

UNITED STATES COURT OF APPEALS

JUL 20 1978

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA :

JOHN P. HEHMAN, Clerk

Plaintiff-Appellee :

v. :

ORDER

LAWRENCE WILCHER a/k/a LARRY WILCHER :

Defendant-Appellant :

- - - - -

Before: PHILLIPS, Chief Judge, ENGEL, Circuit Judge,
and PECK, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by defendant-appellant, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
John P. Hehman, Clerk of Court

APPENDIX "C"

Judgment of the Trial Court:

" The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five Years as to each of Counts 1, 3, 4, 5, 6 and 7 of the Indictment, said sentences to be served concurrently, each with the other.

IT IS FURTHER ORDERED that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO YEARS as to each of Counts 8 and 9 of the Indictment, said sentences to be served concurrently, each with the other, but consecutive to the FIVE YEAR sentence imposed above, for a total sentence of SEVEN YEARS (7) to be served by the defendant, and the defendant is fined \$1,000.00 on Count 1 and \$10,000.00 on Count 8 of the Indictment, for a total fine of \$11,000.00. "

FILED

OCT 3 1978

MICHAEL RODAK, JR., CLERK

No. 78-274

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE WILCHER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-274

LAWRENCE WILCHER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner contends that the trial court erroneously required an attorney who had represented petitioner to answer questions at trial in violation of the attorney-client privilege and that the government did not prove before the jury that petitioner's false testimony was material to a grand jury investigation.

A jury in the United States District Court for the Western District of Kentucky convicted petitioner on six counts of mail fraud, in violation of 18 U.S.C. 2 and 1341, and on two counts of perjury, in violation of 18 U.S.C. 1623. The court sentenced petitioner to seven years' imprisonment and imposed a fine of \$11,000. The court of appeals affirmed (Pet. App. A).

1. Petitioner was charged with devising and carrying out a scheme to defraud fire insurance companies by making claims based on false invoices that overstated the value of merchandise destroyed by fire that petitioner had kept in his insured warehouse. The government called Elmer George, petitioner's attorney in the insurance matters, as a witness, and required George to answer questions over petitioner's objection based on the attorney-client privilege. George was required to reveal his client's name (III Tr. 22-24), authenticate various letters and documents that he had signed or prepared (III Tr. 28-29, 34-38, 55, 71-72; IV Tr. 92, 96-97, 100), reveal that he had filed suit against the fire insurance companies to collect benefits on behalf of petitioner (III Tr. 81), explain a term used in a letter he drafted (III Tr. 72-78), and divulge his fee arrangement with petitioner (IV Tr. 118-120). However, the court sustained objections to government questions of George that inquired about what he had been hired to do (III Tr. 22, 25), what he had said to petitioner (III Tr. 73-74), and what petitioner had said to him (IV Tr. 107).

None of the matters about which George testified were protected by the attorney-client privilege. It is settled that the privilege protects only confidential disclosures by a client to his attorney in order to obtain legal assistance. *Fisher v. United States*, 425 U.S. 391, 403 (1976). The privilege does not prohibit disclosure of the attorney-client relationship or the client's identity,¹ fee arrangements,² the general nature of the legal services

¹*Howell v. Jones*, 516 F. 2d 53 (5th Cir. 1975), cert. denied, 424 U.S. 916 (1976); *In re Michaelson*, 511 F. 2d 882 (9th Cir.), cert. denied, 421 U.S. 978 (1975).

²*In re January 1976 Grand Jury*, 534 F. 2d 719, 728 (7th Cir. 1976).

rendered,³ statements that the client expects the attorney to communicate to third persons, or matters of public record,⁴ such as the letters, invoices and interrogatories involved in this case. Furthermore, the privilege does not protect acts or statements by a client or his attorney in furtherance of a crime.⁵ Since George's testimony related only to his attempts to obtain insurance benefits for petitioner, which was the object of petitioner's fraudulent scheme, that testimony was not privileged.⁶

2. Petitioner further contends (Pet. 11-12) that the government failed to meet its burden of proving the materiality to the petit jury of petitioner's false testimony before the grand jury. This claim is also groundless. Materiality is a question of law for the court and not a question of fact for the jury. *Sinclair v. United States*, 279 U.S. 263, 298 (1929); *United States v. Damato*, 554 F. 2d 1371, 1373 (5th Cir. 1977), *United States v. Percell*, 526 F. 2d 189 (9th Cir. 1975). Although the jury did not hear evidence on the materiality of the perjured testimony, the court heard sufficient evidence to make its determination of law. Thus, Charles Bensinger, the foreman of the grand jury, testified before the court that the grand jury was investigating mail fraud, insurance and arson in

³*Colton v. United States*, 306 F. 2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

⁴*United States v. Cochran*, 546 F. 2d 27, 29 (5th Cir. 1977).

⁵E.g., *In re Doe*, 551 F. 2d 899 (2d Cir. 1977); *United States v. Hodge and Zweig*, 548 F. 2d 1347, 1354 (9th Cir. 1977).

⁶Indeed, the district court rulings, in limiting the government's examination to matters not involving petitioner's communications, and in prohibiting disclosure of petitioner's statements to George, were more favorable to petitioner than the law requires.

connection with the destruction of petitioner's warehouse (IV Tr. 254). Based on this testimony, the court properly found that petitioner's testimony before the grand jury concerning false invoices and insurance claims was material to the investigation (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1978